Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

UNITED FEDERAL LEASING, INCORPORATED,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Fourth Circuit created an intolerable conflict with decisions of the Third[1] and Ninth[2] Circuits by holding that the district court was deprived of Federal Tort Claims Act jurisdiction over a conversion suit against the government on the theory that the tort suit was a breach of contract action in disguise, despite the fact that the plaintiff was not a party to a government contract and was not dependent upon a government promise to sustain its conversion claim.

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1. *Aleutco Corporation v. United States*, 244 F.2d 674 (3d Cir. 1957).

2. *Love v. United States*, 871 F.2d 1488 (9th Cir. 1989), *amended opinion*, 915 F.2d 1242 (9th Cir. 1990).

PARTIES AND CORPORATE DISCLOSURE STATEMENT

The petitioner is United Federal Leasing, Incorporated ("United"), a privately owned corporation. No publicly held corporation owns more than 10% of United's stock. The respondent is The United States of America, the interested agency being The United States Navy. EMC Corporation of Massachusetts, a/k/a EMC Corporation ("EMC") is a publicly traded corporation. It was a defendant in the district court but reached a settlement with United before the district court's dismissal of the complaint below. EMC is not a party to this petition and not an interested party.

ePlus Government, inc. has a profit sharing arrangement with United which makes it an interested party in this case. It is a subsidiary of ePlus, Inc., a publicly traded corporation. There are no other interested parties.

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CITATION TO OFFICIAL AND UNOFFICIAL REPORTS

The decision below has not been officially reported. It is unofficially reported at 2002 U.S. App. LEXIS 7047, 33 Fed. Appx. 672

STATEMENT OF JURISDICTION

The judgment which this petition seeks to have reviewed was entered April 17, 2002. Petitioner timely filed a Petition for Rehearing *En Banc* on May 1, 2002. The Court of Appeals denied the Petition For Rehearing *En Banc* on June 14, 2002.

This court has certiorari jurisdiction over this case under 28 U.S.C. § 1254. The court of appeals' jurisdiction was based on 28 U.S.C. § 1291, and the district court had jurisdiction over this case under 28 U.S.C. § 1346, unless the lower courts were correct that this tort claim was really a contract suit in disguise.

STATUTES IN ISSUE

United States Code, Title 28

Section 2674. Liability of United States

> **The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.**

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

With respect to any claim to which this section applies, the Tennessee Valley Authority shall be entitled to assert any defense which otherwise would have been available to the employee based upon judicial or legislative immunity, which otherwise would have been available to the employee of the Tennessee Valley Authority whose act or omission gave rise to the claim as well as any other defenses to which the Tennessee Valley Authority is entitled under this chapter

Section 1346. United States as defendant.

(a) The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:

* * *

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin

Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * *

United States Code, Title 41

Section 601.

(1) the term "agency head" means the head and any assistant head of an executive agency, and may "upon the designation by" the head of an executive agency include the chief official of any principal division of the agency;

(2) the term "executive agency" means an executive department as defined in section 101 of Title 5, an independent establishment as defined by section 104 of Title 5 (except that it shall not include the General Accounting Office), a military department as defined by section 102 of Title 5, and a wholly owned Government corporation as defined by section 9101(3) of Title 31, the United States Postal Service, and the Postal Rate Commission;

(3) the term "contracting officer" means any person who, by appointment in accordance with applicable regulations, has the authority to enter into and administer contracts and make determinations and findings with respect thereto. The term also includes the authorized representative of the contracting officer, acting within the limits of his authority;

(4) the term "contractor" means a party to a Government contract other than the Government;

(5) the term "Administrator" means the Administrator for Federal Procurement Policy appointed pursuant to the Office of Federal Procurement Policy Act [41 U.S.C.A. § 401 *et seq.*];

(6) the term "agency board" means an agency board of contract appeals established under section 607 of this title; and

(7) the term "misrepresentation of fact" means a false statement of substantive fact, or any conduct which leads to a belief of a substantive fact material to proper understanding of the matter in hand, made with intent to deceive or mislead

Section 602. Applicability of Law.

(a) Executive agency contracts

Unless otherwise specifically provided herein, this chapter applies to any express or implied

contract (including those of the nonappropriated fund activities described in sections 1346 and 1491 of Title 28) entered into by an executive agency for —

(1) the procurement of property, other than real property in being;

(2) the procurement of services;

(3) the procurement of construction, alteration, repair or maintenance of real property; or,

(4) the disposal of personal property.

(b) Tennessee Valley Authority contracts

With respect to contracts of the Tennessee Valley Authority, the provisions of this chapter shall apply only to those contracts which contain a disputes clause requiring that a contract dispute be resolved through an agency administrative process. Notwithstanding any other provision of this chapter, contracts of the Tennessee Valley Authority for the sale of fertilizer or electric power or related to the conduct or operation of the electric power system shall be excluded from the chapter.

(c) Foreign government or international organization contracts

> This chapter does not apply to a contract with a foreign government, or agency thereof, or international organization, or subsidiary body thereof, if the head of the agency determines that the application of the chapter to the contract would not be in the public interest.

STATEMENT OF THE CASE

Electronic Data Systems Corporation ("EDS") entered into a long term contract with the United States Navy ("the Navy") which provided, *inter alia*, for the leasing of computer equipment. In 1996, the Navy issued delivery orders for the leasing of computer equipment manufactured by EMC Corporation ("EMC"). EDS then contracted with EMC to obtain the required equipment under a lease, and EDS then subleased the equipment to the Navy. The EDS-EMC contract contained "flow down" provisions, i.e., if the Navy terminated its lease early, EDS could similarly terminate the EMC lease early. The EDS-EMC contract authorized EMC to assign its rights to third parties, and EMC sold the computer equipment to United and assigned to United the right to receive EDS' lease payments.

On August 31, 1998, the Navy notified EDS that the lease was being terminated early, effective September 30, 1998. EDS notified United, also informing United that, since its contract was terminated, EDS had no further rights or interest in the computer equipment. In the meantime, October 1, 1998 passed and the Navy continued to use the computer equipment.[1] United notified the Navy that it was owner of the equipment and demanded that the Navy make it available

1. Complaint ¶ 38, App. 33a.

for removal. The Navy refused, stating that, as the Navy's contract was with EDS, "and the Navy has no contractual arrangement with your company, you will need to pursue your interests with whomever you have contracted for this equipment."[2] The Navy then continued to use the computer equipment until it was finished with it without paying United or anybody else.[3]

United filed a tort claim with the Navy for conversion, seeking damages of $560,000, the fair market value for the equipment over the period the Navy retained it after termination. The Navy denied the claim. United then sued the Navy for conversion under the Federal Tort Claims Act ("FTCA"), basing jurisdiction on 28 U. S. C. § 1346.[4]

The Motion to Dismiss

The Navy moved to dismiss, contending that, since the dispute arose from a government procurement, it was governed by the Contract Disputes Act of 1978 ("CDA") rather than FTCA, thereby depriving the district court of jurisdiction.[5] In its opposition to the motion, United pointed out that, since it was not a party to the Navy contract, it could

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2. October 19, 1998 letter of Contracting Officer Gleixner to United, App. 40a.

3. Complaint ¶ 36-38, App. 33a.

4. United also sued EMC under the EMC-United agreement. EMC and United settled prior to the government's motion to dismiss. EMC is not a party to this proceeding.

5. CDA jurisdiction is exclusively in the United States Court of Federal Claims or Boards of Contract Appeals.

not proceed under CDA.[6] United contended that the test for whether a tort suit is really a contract suit in disguise is whether the plaintiff's success in the tort suit depends on establishing the government's breach of a promise in a government contract.[7] Since United's ownership of the equipment depended on its contract with EMC, not on any government contract, United argued its suit sounded in tort, not contract.

The District Court's Decision

In granting the government's motion, District Judge Lee framed a test broader than that which United claimed was required by the cases, holding that the suit was a contract suit in disguise, because United's rights were inextricably connected with government contracts.[8] Judge Lee reasoned that CDA governed, "[b]ecause the contract between the Navy and EDS involved the purchase or lease of property (i.e., computer equipment) . . ."[9] In *United States v. J. & E. Salvage Co.*, 55 F. 3d 985 (4th Cir. 1995) ("*Salvage*"), the Fourth Circuit had held a government tort claim to be a contract suit in disguise, subject to CDA, where containers sold by the government at auction had valuable property inside and the issue was whether the government sale contract covered the contents. Judge Lee contended this case fell under *Salvage*

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6. *See United States v. Johnson Controls, Inc.*, 713 F.2d 1541 (Fed. Cir. 1983) ("*Johnson Controls*"); *See also* 41 U.S.C. § 601(4)

7. Citing primarily *Love v. United States*, 871 F.2d 1488 (9th Cir. 1989), *amended opinion*, 915 F.2d 1242 (9th Cir. 1990).

8. App. 17-18a. (op. 10-11)

9. App. 16a. (op. 9)

because "it is impossible to ignore the terms of the contract documents in deciding whether plaintiff had a right of possession over the equipment."[10]

Appeal

United appealed to the Fourth Circuit. After hearing argument October 30, 2001, the panel issued an unpublished opinion over six months later, on April 17, 2002. In its *per curiam* opinion, the court of appeals stated the facts at length and correctly set forth the dichotomy between FTCA jurisdiction over tort suits and CDA jurisdiction over contract suits.[11] The panel then adopted and quoted from District Judge Lee's opinion emphasizing the need to look at the EDS, EMC and Navy contracts in deciding whether United had a right to possession of the equipment.[12] United petitioned for rehearing *en banc* May 1, 2002. The court of appeals issued an order June 14, 2002 denying the petition.

REASONS FOR GRANTING THE WRIT

The writ should be granted, because the court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter. Rule 10(a). United realizes that there "must be a real or 'intolerable' conflict, not merely an inconsistency in dicta or in the general principles criticized." R. Stern, E. Gressman, S. Shapiro, K. Geller, Supreme Court Practice 225 (8th ed. 2002). United believes the Fourth Circuit's decision is in

10. App. 18a. (op. 11)

11. App. 11a. (op. 4)

12. App. 12-13a. (op. 5-6)

intolerable conflict with the Ninth Circuit, Third Circuit and Federal Circuit.

The Ninth Circuit standard for when a FTCA suit cast as a tort is really a contract suit in disguise is set forth in *Love v. United States*, 871 F. 2d 1488 (9th Cir. 1989), *amended opinion*, 915 F. 2d 1242 (9th Cir. 1990) ("*Love*"). *See also Fort Vancouver Plywood Co. v. United States*, 747 F. 2d 547 (9th Cir. 1984) ("*Fort Vancouver*"); *Woodbury v. United States*, 313 F. 2d 291 (9th Cir. 1963) ("*Woodbury*"). The Ninth Circuit bars FTCA jurisdiction only where the plaintiff must establish breach of a government promise in a government contract to prevail on the conversion suit. In *Love*, the Ninth Circuit applied its test to sustain the conversion suit. The same is true of *Fort Vancouver*. Since United's ownership stems from its contract with EMC, and its right to recover the computer equipment is independent of the government contract[13], which terminated before United demanded return of its property, the *Love* test sustains FTCA jurisdiction here, creating an intolerable conflict.

In *Wood v. United States*, 961 F. 2d 195 (Fed. Cir. 1992) ("*Wood*"), the Federal Circuit adopted the Ninth Circuit test, albeit in a case in which it rejected FTCA jurisdiction, because the tort claim depended on a government breach of promise; "[b]ecause Wood's claim is 'essentially for breach of contractual undertaking, and the liability, if any, depends

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13. Of course, United's claim to tort status is even stronger, since it is not a party to a government contract and, therefore, can assert no CDA rights under one. *Johnson Controls*, *supra*. While no court of appeals opinion addresses the non-contract party situation, a district court applying the Ninth Circuit criterion finds it mandates FTCA jurisdiction. *See Nottingham, Ltd. v. United States*, 741 F. Supp. 1445 (C.D. Cal. 1989).

wholly on the government's alleged promise, the action must be under the Tucker Act, and cannot be under the Federal Tort Claims Act,'" quoting *Woodbury* and citing *Love*.

The Fourth Circuit's decision also conflicts with Third Circuit decisions. In *Aleutco Corporation v. United States*, 244 F. 2d 674 (3d Cir. 1957) ("*Aleutco*"), the Third Circuit sustained a conversion verdict against the government over a contract-suit-in-disguise claim, holding that, where the plaintiff could validly plead either a tort claim or a contract claim against the government, the plaintiff's choice will be dispositive under FTCA; ". . . as a result of the Tort Claims Act, there is no policy in the law which requires that the forum of the district court be denied a plaintiff who pleads and proves a classic case in tort." 244 F. 2d at 679. *Aleutco*, like *Love*, is in intolerable conflict with the Fourth Circuit's decision in this case, because the Third Circuit sustained FTCA jurisdiction (indeed, a judgment) on a rule of law — that the pleader's choice of a valid tort claim governs — which can only sustain jurisdiction in this case. *Aleutco's* test is more *pro*-FTCA jurisdiction than the Ninth Circuit's. In a later case, however, the Third Circuit appears to have reconciled *Aleutco* with the Ninth Circuit line of cases, quoting from *Woodbury* and rejecting FTCA jurisdiction where the tort suit depended wholly upon proving the government's breach of a promise. See *Petersburgh Borough v. United States*, 839 F. 2d 161, 163 (3d Cir. 1988). The *Aleutco* result would be the same under this test.

While the Ninth and Third Circuits' results are in intolerable conflict with this case and their tests and the Federal Circuit's test in *Wood* must sustain FTCA jurisdiction here, the one *reported* Fourth Circuit case in point, *Salvage*, is basically *neutral* on point and certainly does not sustain

the result below. On its facts, *Salvage* rejected FTCA jurisdiction, because the government's claim for conversion of the contents of the containers it sold depended wholly on interpreting the sale contract. But the court also said, "[o]f course, the mere fact that a court has to decide some contract issues in the course of resolving a tort claim does not automatically convert the claims into one sounding in contract if there is some independent basis for the tort claim." 55 F.3d at 989. It is not *Salvage* but this case that puts the Fourth Circuit in conflict with the Ninth, Third and Federal Circuits.

The Chief Justice has stated, "[t]here are really only two or three factors comprised in the certiorari decision — conflict with other courts, importance and the perception that the decision is wrong in light of Supreme Court precedent." Chief Justice Rehnquist, The Supreme Court, How it was, How it is 266 (1987), quoted in Stern, Gressman, Shapiro, Geller, *supra* at 258. In this case, the issue presented is of great public importance in the administration of jurisdiction of the district courts in suits against the government. The sovereign immunity of the United States is waived under two statutes, FTCA and CDA, which, except for express reservations of the waiver, are not intended to leave interstitial areas unwaived or to encroach upon each other. The district court's decision, which the court of appeals adopts, creates a new theory — that valid tort cases can be excluded from FTCA because some examination of contracts may be necessary to resolve issues in a tort case. This is a test which undermines FTCA, pushing valid FTCA cases out of district courts for no valid policy. To the extent that the lower court opinions see CDA as changing the test for when a FTCA suit fails as a contract suit in disguise, there is nothing

in the CDA text or legislative history indicating an intent to change the pre-existing Ninth Circuit and Third Circuit criteria.

The Fourth Circuit's decision is also wrong under — and inconsistent with — principles decided in this Court's older cases involving immunity issues. In *Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U. S. 381, 59 S. Ct. 516, 83 L. Ed. 784 (1939), which pre-dated FTCA, a party who bailed property to the government sued the government under the then-existing contract waiver for improper care of the property. Since it was immune from tort suit, the government took the opposite side of the coin it played in this case, claiming it was a tort suit in disguise. This Court rejected the government's effort to oust jurisdiction on the theory that suit could only be brought in tort, stating that there was "a choice of procedural vindications open to the injured party" which the plaintiff was entitled to make. 306 U. S. at 395, 59 S. Ct. at 521. This is essentially the *Aleutco* test. The principle of allowing the pleader to choose is particularly important where, as here, petitioner had only one choice; as a party not in privity of contract with the government, United could not proceed under CDA. See *Johnson Controls*, *supra*.

United has no way of knowing what internal politics caused the Fourth Circuit panel to decide this case in such a strange manner, sitting on the case for over six months and then issuing an unpublished opinion adopting the district court's anti-FTCA test. Presumably, the unpublished nature of the opinion was an effort to evade review in the Fourth Circuit or here. In these days of online access to decisions, however, the decision is readily available on Lexis, Westlaw and elsewhere and, unless *certiorari* is granted, will be used to undermine FTCA jurisdiction. Accordingly there is no

justification to refuse review to this case — which otherwise warrants review — because the panel marked the decision unpublished.

CONCLUSION

The writ should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DECIDED APRIL 17, 2002

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 01-1395

UNITED FEDERAL LEASING, INCORPORATED,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee,

and

EMC CORPORATION OF MASSACHUSETTS, a/k/a EMC Corporation,

Defendant.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Gerald Bruce Lee, District Judge. (CA-00-1418-A)

Argued: October 30, 2001

Decided: April 17, 2002

Appendix A

Affirmed by unpublished per curiam opinion.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

The issue on appeal is whether United Federal Leasing's (United)[1] claim against the United States (government) is based in contract or tort. The district court concluded that it lacked jurisdiction over United's suit since its claims were inextricably grounded in contract, and thereby governed by the Contract Disputes Act of 1978, 41 U.S.C. § 601 (amended). Finding United's claim to be a contract dispute, we affirm the district court's dismissal for lack of subject matter jurisdiction.

In 1987, the government entered into a contract (prime contract) with Electronic Data Systems Corporation (EDS) for the leasing of computer equipment to the Navy. As in many government contracts, the prime contract contained escape clauses allowing the government to terminate for various reasons without breaching the contract. These clauses provided for early termination of the prime contract upon the government timely notifying EDS. In addition, the prime contract, through clause H17.1, described the removal responsibilities for the computer equipment upon contract termination.

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1. At the time of contracting, United's name was MLC Group, Inc.

Appendix A

To fulfill its lease with the government, EDS then subcontracted with EMC Corporation (EMC), a manufacturer and vendor of computer equipment. This contract referred to the Federal Acquisition Regulations and the Contract Disputes Act procedures of the prime contract. The EDS-EMC contract required EMC to provide computer equipment in exchange for the lease payments EDS was to receive from the government. In 1996, the government issued delivery orders to lease EMC computers for forty-two months under the prime contract. EMC still owned the computers and reserved the option to assign both the government's lease payments and title to the equipment. EMC exercised this option and assigned its rights to United for financing of the computer equipment. United is a commercial equipment lessor/ financier. The EMC-United agreement gave ownership of the computers to United and required EMC to dismantle and remove the computer equipment from the government's sites upon termination of the prime contract.

On August 31, 1998, the government's contracting officer gave the required 30-day notice to EDS for lease termination effective September 30, 1998. Both parties agree that the notice and termination were in compliance with the prime contract. Upon termination, United requested EMC to de-install the equipment and make it available for pickup. EMC failed to do so. United then contacted EDS, demanding the computers' availability on October 1, 1998. EDS promptly responded that the prime contract was satisfied; therefore, EDS no longer had any rights or interests in the equipment since it assigned its rights EMC. United also contacted the government, informing it that United owned the computer equipment and demanded the equipment for removal and

remarketing. On October 19, the government responded to United by stating it had terminated the lease at issue, the prime contract was between the Navy and EDS, and the Navy had "no contractual arrangement with your company, [so] you will need to pursue your interest with whomever you have contracted with for this equipment." We are told at oral argument that, ultimately, EMC removed the computers in mid-November, 1998.

On October 21, 1998, United claimed under the Federal Tort Claims Act that the government converted its computer equipment and sought damages of $560,000. In February 2000, the government denied the claim, whereupon United sued both EMC and the government on August 21, 2000. United sought damages for the six-week period following the termination of the prime contract when the government was in possession of the computer equipment. The district court granted the government's motion to dismiss for lack of subject matter jurisdiction on March 2, 2001. United has subsequently settled with EMC.

Appellate jurisdiction exists under 28 U.S.C. § 1291, as a final judgment from the district court. We review de novo the district court's dismissal of the case for lack of subject matter jurisdiction. See *Evans v. B.F. Perkins Co.*, 166 F.3d 642, 647 (4th Cir. 1999).

While the federal government is normally shielded from liability, the government has waived immunity under the Federal Torts Claims Act, 28 U.S.C. § 2671 (FTCA), and the Contract Disputes Act of 1978, 41 U.S.C. § 601 (amended) (CDA). The FTCA does not create a new cause of action,

but provides that the United States is liable for torts "in the same manner and to the same extent as a private individual. . . ." 28 U.S.C. § 2674. Jurisdiction for suit under the FTCA exists in United States District Court. 28 U.S.C. § 1346.

The CDA provides for legal recourse against the government for disputes arising from the procurement of property and services by the federal government.[2] 41 U.S.C. § 602(a). The CDA requires an initial filing with the contracting officer for any governmental contract dispute. 41 U.S.C. § 605(a). Necessary appeals proceed to the agency's board then to the Court of Federal claims. 41 U.S.C. § 607, 609. Unlike the FTCA, the CDA limits jurisdiction to the Court of Federal Claims, rather than U.S. District Courts. *United States v. J & E Salvage Co.*, 55 F.3d 985, 987 (4th Cir. 1995) (citing S. Rep. No. 1118, 95th Cong., 2d Sess. 10, reprinted in 978 U.S.C.C.A.N. 5235, 5244 (noting that "U.S. district court jurisdiction is eliminated from Government contract claims")).

If the basis of this case is in tort, the district court erred in dismissing United's claim under the FTCA; however, if United's claim is contractual, the district court correctly dismissed the case since United did not pursue the required procedural recourse. United argues that this is a mere conversion case, suitable for disposition under the FTCA. It contends that the nature of the complaint is one for tort —

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2. Case law defines "procurement" as an acquisition by purchase, lease, or barter, or property or services for the direct benefit or use of the federal government. *New Era Constr. v. United States*, 890 F.2d 1152, 1157 (Fed. Cir. 1989)

specifically that United owned the computer equipment and the government converted this equipment during the six-week period after the termination of the prime contract.

We agree with the district court, however, that this claim is contractual. The essence of its opinion, with which we agree, follows:

> Plaintiff cannot overcome this Court's lack of jurisdiction by framing the claim against the United States as a tort claim. See *J & E Salvage*, 55 F.3d at 988 (stating that neither contractors nor government may bring contract action in district court simply by recasting claims in tort language or as statutory or regulatory violation). Notwithstanding Plaintiff's arguments, Plaintiff's conversion claim sounds in contract because it is necessary to look at the terms of the contracts between Plaintiff, EMC, EDS, and the Navy to find the source of the rights Plaintiff claims in the computer equipment. See *id.* (noting that the source of the rights claimant sought to vindicate were rooted firmly in contract). Plaintiff's claim for conversion is based on Plaintiff's asserted "right to possession" of the equipment. (Compl. ¶¶ 41-43.) Plaintiff asserts that it possessed the equipment that Defendant has failed to return as a result of the "EMC-MLC Federal contract," by which EMC sold and assigned to Plaintiff all of EMC's right and interest in the equipment and granted Plaintiff a security interest in the equipment. (*Id.* ¶ 14.) As in the Fourth Circuit case of *J & E Salvage*,

it is impossible to ignore the terms of the contract documents in deciding whether Plaintiff had a right of possession over the equipment. *See J & E Salvage*, 55 F.3d at 988; *Wood*, 961 F.2d at 199 (stating that a claim was based in contract, not tort, when the only way plaintiff could succeed in proving conversion was to prove existence of a contract sufficient to give him ownership interest). Therefore, Plaintiff's "claims of 'conversion' . . . are merely transparent reformulations of [a] contract dispute." *J & E Salvage*, 55 F.3d at 989. In short, Plaintiff cannot invoke the jurisdiction of this Court by framing a claim as other than contractual, when, in fact, "the genesis of any wrongdoing by the United States was breach of contract." *Coffey*, 626 F.Supp. at 1248; *see also Wood*, 961 F.2d at 198 (holding that jurisdiction lies in Claims Court where cause of action arises primarily from a contractual undertaking).

The judgment of the district court is accordingly

AFFIRMED.

APPENDIX B — MEMORANDUM ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION DATED MARCH 2, 2001

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA ALEXANDRIA DIVISION

Civil Action No. 00-1418-A

UNITED FEDERAL LEASING, INC.,

Plaintiff,

v.

EMC CORPORATION and
UNITED STATES OF AMERICA,

Defendants.

MEMORANDUM ORDER

THIS Matter is before the Court on the Motion by the United States to Dismiss the Complaint. The issue before the Court is whether Plaintiff's conversion claim against the United States is inextricably grounded in contract such that subject matter jurisdiction is improper in federal district court pursuant to the provisions of the Contract Disputes Act of 1978. The Court holds that it lacks subject matter jurisdiction over Plaintiff's claim because the claim is dependent on rights Plaintiff obtained through government-related contracts. Accordingly, it is hereby

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ORDERED that Defendant the United States' motion to dismiss is GRANTED.

The facts relevant to this case are that the United States Navy (represented by Defendant the United States of America) entered into a contract with Electronic Data Systems Corp. ("EDS") by which the Navy leased computer equipment from EDS. EDS entered into a contract with EMC Corporation ("EMC"), the manufacturer of computer equipment, for EMC to supply EDS with the computers that EDS was to supply to the Navy. EMC would receive some of the lease payments paid by the Navy. EMC then arranged with Plaintiff United Federal Leasing, Inc. (then known as MLC Federal, Inc.) for Plaintiff to finance EMC's performance of the EDS-EMC subcontract. EMC sold and assigned to Plaintiff all of EMC's rights and interest in the computer equipment.

The Navy ultimately terminated the lease of the equipment financed by Plaintiff when EMC contracted with the Navy to supply the Navy with new EMC equipment. Upon termination of the lease, the Navy did not return to Plaintiff the equipment financed by Plaintiff. Moreover, the Navy continued to use Plaintiff's equipment even after lease termination until the Navy received the new EMC equipment. Plaintiff has made several demands for the return of the equipment.

Plaintiff sues Defendant the United States for conversion (Count I). Defendant moves to dismiss pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure for lack of subject matter jurisdiction.

Appendix B

Defendant asserts in support of its motion that the Federal Tort Claims Act ("FTCA") and the Contract Disputes Act ("CDA") constitute waivers by the United States of its sovereign immunity from suit. *See United States v. Orleans*, 425 U.S. 807, 813-14 (1976) (indicating that FTCA is United States waiver of immunity. The Court's jurisdiction through statues waiving the United States' immunity from suit must be strictly construed in favor the United States. *See United States v. Mitchell*, 445 U.S. 535, 538 (1980); *McMahon v.* United *States*, 342 U.S. 25, 27 (1951) .

Defendant argues that Plaintiff's claim should not be maintained under the FTCA, but instead under the CDA. Defendant contends that "the mere allegation of a breach of duty under Federal law does not, by itself, state a valid tort claim against the government." Goldstar *(Panama) S. A. v. United States*, 967 F.2d 965, 969 (4th Cir. 1992). This dispute involves two federal procurement contracts and so would normally be resolved under the CDA, 41 U.S.C. § 601, *et seq. See Bonneville Associates v. United States*, 43 F. 3d 649, 653 (Fed. Cir. 1994), *citing New Era Constr. v. United States*, 4890 F.2d 1152, 1157 (Fed. Cir.. 1989).

Defendant contends that this Court lacks subject matter jurisdiction because "U.S. district courts jurisdiction is eliminated from Government contract claims." S. Rep. No. 1118, 95th Cong., 2d Sess. 10, *reprinted in* 978 U.S.C.C.A.N. 5235, 5244. The CDA's dispute resolution procedures are exclusive. *See Cecile Inds. v. Cheney*, 995 F.2d 1052, 1055 (Fed. Cir. 1993); *Cascade Pacific Int'1 v. United States*, 773 F.2d 287, 296 (Fed. Cir. 1985); 41 U.S.C. § 605(b). Defendant argues that Plaintiff was required to first file a certified claim to the

contracting officer, then to appeal, if necessary, to the agency's board of contract appeals or the Court of Federal Claims. *See id.* §§ 607, 609. Plaintiffs may not circumvent the requirements of the CDA by casting their claim as a tort (i.e., conversion). See *United States v. J & E Salvage Co.*, 55 F.3d 985, 988 (4th Cir. 1995); *Cenna v. United States*, 402 F. 2d 168 (3rd Cir. 1968).

Defendant asserts that the Court should note that this action genuinely sounds in contract and is not based on truly independent grounds. *See Dator Corp. v. Rufus S. Lusk & Son*, 57 F.3d 1065 (4th Cir. 1995) (unpublished) (noting that there would be no basis for conversion claim outside of existence of the contract); *Coffey v. United States*, 626 F. Supp. 1246, 1248 (D. Kan. 1986) (declining to exercise jurisdiction over tort claim arising out of a federal contract); *Haney v. Castle Meadows, Inc.*, 868 F. Supp. 1233, 1237 (D. Colo. 1994) (refusing to accept plaintiff's characterization of claims as sounding in tort and not contract); *General Dynamics Corp. v. United States*, 139 F.3d 1280, 1283 (9th Cir. 1998) (stating that courts should not look at labels on surface of complaint, but should ascertain true basis of complaint). Contracts that permit conversion claims under the FTCA do not involve federal procurement contracts. *See, e.g., Taylor v. Bright*, 229 F.3d 1144 (4th Cir. 2000) (unpublished) .

Defendant asserts that it is not dispositive of the Court's inquiry of whether Plaintiff's claims are contract-based that Defendant's and Plaintiff's relationship is created through subcontracts. See *Eastern, Inc. v. Shelly's of Delaware, Inc.*,

721 F. Supp. 649, 651, 652 (D. N.J. 1989) (stating that CDA closes door to district courts for subcontractors as well as contractors). The CDA is available to subcontractors through sponsorship of the prime contractor. *See, e.g., Spodek v. United States*, 26 F. Supp. 2d 750, 757 (E.D. Pa. 1998); *Reilly Electrical Supply Co. v. Hights' Enterprises, Inc.*, 1998 WL 209457 (E.D. La. 1998) .

Defendant argues that even if this were an FTCA suit, jurisdiction is not proper in this Court because Plaintiff has not exhausted its administrative remedies or followed procedure under the FTCA. *See Ahmed v. United States*, 30 F.3d 514, 516-17 (4th Cir. 1994); 28 U.S.C. §§ 1346(b), 2671-2680 (stating that claims must be presented to proper agency by claimant or legal representative, must be presented in the name of the claimant, be signed by agent or representative, and be accompanied by evidence of authority for agent to act on behalf of claimant). Defendant contends that Plaintiff's counsel, Michael Geltner, Esq., has not submitted the necessary evidence that he acts on behalf of Plaintiff. *See, e.g., Triplett v. United States*, 501 F. Supp. 118 (Nev. 1980). *But see, e.g., Knapp v. United States*, 844 F. 2d 376 (6th Cir. 1988); *GAF Corp. v. United States*, 818 F.2d 901 (D.C. Cir. 1987).

In opposition, Plaintiff asserts that this is an action under the FTCA. Plaintiff contends that it followed the FTCA requirement of first filing an administrative claim (Pl.'s Ex. 2.), and sending a certification signed by Plaintiff's president that Mr. Geltner was authorized to represent Plaintiff (Pl.'s Ex. 5; Geltner Decl. ¶ 11).

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Plaintiff further asserts that this suit is properly cast as one for conversion under the FTCA. *See, e.g., ChoPP Computer Corp. v. United States*, 5 F.3d 1344, 1347 (9th Cir. 1993).[1] The "fact that [Plaintiff] and [Defendant] were in a contractual relationship does not convert a tortious claim into one in contract." *Aleutco v. United States*, 244 F.2d 674 (3rd Cir. 1957); *see also Love v. United States*, 871 F.2d 1488, 1492-93 (9th Cir. 1989). Plaintiff argues that even if no contract exists between Defendant and Plaintiff demonstrating Plaintiff's ownership of the property at issue, Plaintiff has a valid claim of conversion against Defendant. Plaintiff contends, therefore, that Plaintiff's claims sound in tort, not in contract. *See Wood v. United States*, 961 F.2d 195, 198-99 (Fed. Cir. 1992) (distinguishing when a contract is only an underlying element of a tort from when the contract establishes the cause of action); *J & E Salvage*, 55 F.3d at 989 (stating that existence of contract does not convert tort claim to contract claim where there is independent basis of tort claim). Plaintiff argues that, although it had a contract with EMC, Plaintiff had no contract with Defendant, and therefore Plaintiff is not improperly attempting to waive any contract and sue in tort under the FTCA. *See Nottingham, Ltd. v. United States*, 741 F. Supp. 1145 (C.D. Cal. 1990), *subsequent opinion* 741 F. Supp. 1147 (C.D. Cal. 1990).

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1. Defendant does not dispute that a valid conversion suit is cognizable under the FTCA, but states that Plaintiff has not pled a cause of action for conversion under the elements of the claim pursuant to Pennsylvania law. (Def. Rebuttal at 4-5.) The Court need not reach the issue of whether Plaintiff has stated a claim for conversion because the motion before the Court is not a 12 (b) (6) motion to dismiss.

In addition, Plaintiff contends that it has no remedy in the Court of Federal Claims in a dispute against Defendant under the CDA. Plaintiff argues that a subcontractor on a government contract cannot sue the government under the *CDA. See Johnson Controls, Inc. v. United States*, 713 F.2d 1541, 1551 (Fed. Cir. 1983); *Johnson Controls, Inc. v. United State*s, 8 Cl. Ct. 359 (1985).

Plaintiff further asserts that Defendant is perverting Congress' purpose in having a presentment requirement by seeking to use the requirement to dismiss meritorious claims on mere technicalities. Plaintiff contends that it is not important that the claim was signed by Mr. Geltner and not by Plaintiff. The FTCA imposes no technical requirement other than timely presentation of a claim. *See* 28 U.S.C. § 2675(a). Counsel's note that he is representing Plaintiff was sufficient evidence to satisfy 28 C.F.R. § 14.2(a). Plaintiff argues that, contrary to Defendant's assertion, *Ahmed* did not hold that a suit is invalidated if the claim is not accompanied by evidence of counsels' authority to represent the claimant. 30 F.3d at 517. Furthermore, it has been held that agencies do not have power through regulation to determine the jurisdiction of Article III courts; so a case should not be invalid by a claimant's failure to observe a minor technical filing requirement.

In response to Plaintiff's assertions, Defendant states that it does not dispute that a valid conversion claim is cognizable under the FTCA, but argues that Plaintiff's claims are not FTCA claims. Defendant asserts that the cases Plaintiff relies on for how to distinguish tort claims from contract claims predate the CDA. Defendant further asserts that Plaintiff

ignores that the reason why Defendant had any duty to Plaintiff was solely through the existence of the contract notwithstanding that the contract had expired, and that the expiration set into motion the events at the heart of this suit.

DISCUSSION

Standard of Review

When considering a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), the Court should consider "whether plaintiff's allegations, standing alone and taken as true [plead] jurisdiction and a meritorious cause of action." *Dickey v. Greene*, 729 F.2d 957, 958 (4th Cir. 1984). Upon a challenge of the existence of subject matter jurisdiction, the party asserting jurisdiction bears the burden of establishing that subject matter jurisdiction exists. *See Richmond, Fredericksburg & Potomac R.R. Co. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991).

Analysis

The Court grants Defendant's motion to dismiss because the CDA bars this Court's jurisdiction over this case. *See* 41 U.S.C. § 601 *et seq.* The CDA eliminates a federal district court's jurisdiction over Government contract claims. S. Rep. No. 1118, 95th Cong., 2d Sess. 10, *cited in J & E Salvage Co.*, 55 F.3d at 987. The Fourth Circuit has held that the CDA's dispute resolution procedures are exclusive; therefore, if a plaintiff brings a cause of action involving certain types of contracts, then the cause of action must proceed under the CDA and its requirements. *See Spodek*, 26 F. Supp. at 755

(describing the Fourth Circuit's stance); *J & E Salvage Co.*, 55 F. 3d at 987; *see also Cecile Inds.*, *995* F.2d at 1055. The CDA governs cases involving the procurement of property:

> (a) Executive Agency contracts
>
> Unless otherwise specifically provided herein, this chapter applies to any express or implied contract . . . entered into by an executive agency for —
>
> (1) *the procurement of property*, other than real property in being;
>
> (2) the procurement of services;
>
> (3) the procurement of construction, alteration, repair or maintenance of real property; or,
>
> (4) the disposal of personal property.

41 U.S.C. § 602 (a) (Supp. V 1993) (emphasis added). Because the contract between the Navy and EDS involved the purchase or lease of property (i.e., computer equipment), the CDA governs disputes regarding the contract at issue here. *See Bonneville Assocs.*, 43 F. 3d at 653 (defining "procurement" in CDA context); *infra* at 8 (detailing why the contract with the Navy implicates Plaintiff's suit). The CDA requires that a complainant initiate contract dispute resolution by filing a certified claim to the officer or representative of the government agency with whom the plaintiff contracted, *see* 41 U.S.C. § 605(x), followed by an appeal, if necessary, before either the agency's board of contract appeals, *see id.* § 607(d), or the Court of Federal

Claims, *see id.* § 609(c). Plaintiff must file further appeals from these bodies with the United States Court of Appeals for the Federal Circuit. *See id.* § 607(g)(1). When the contracting officer for the Navy denied Plaintiff's complaint (Pl.'s Ex. 11), Plaintiff initiated this civil action before the district court (Pl. Opp'n to Mot. to Dismiss at 5). Because this Court finds that the CDA governs Plaintiffs claims, the Court holds that Plaintiff should have appealed the Navy's decision to the Navy's board of contract appeals or to the Court of Federal Claims; jurisdiction is not proper in this Court.

Plaintiff cannot overcome this Court's lack of jurisdiction by framing the claim against the United States as a tort claim. *See J & E Salvage*, 55 F.3d at 988 (stating that neither contractors nor government may bring contract action in district court simply by recasting claims in tort language or as statutory or regulatory violation). Notwithstanding Plaintiff's arguments, Plaintiff's conversion claim sounds in contract because it is necessary to look at the terms of the contracts between Plaintiff, EMC, EDS, and the Navy to find the source of the rights Plaintiff claims in the computer equipment. *See id.* (noting that the source of the rights claimant sought to vindicate were rooted firmly in contract). Plaintiff's claim for conversion is based on Plaintiff's asserted "right to possession" of the equipment. (Compl. ¶¶ 41-43.) Plaintiff asserts that it possessed the equipment that Defendant has failed to return as a result of the "EMC-MLC Federal contract," by which EMC sold and assigned to Plaintiff all of EMC's right and interest in the equipment and granted Plaintiff a security interest in the equipment. (*Id.* ¶ 14.) As in the Fourth Circuit case of *J & E Salvage*, it is impossible to ignore the terms of the contract documents

in deciding whether Plaintiff had a right of possession over the equipment. *See J & E Salvage*, *55* F.3d at 988; Wood, 961 F.2d at 199 (stating that a claim was based in contract, not tort, when the only way plaintiff could succeed in proving conversion was to prove existence of a contract sufficient to give him ownership interest). Therefore, Plaintiff's "claims of 'conversion' . . . are merely transparent reformulations of [a] contract dispute." *J & E Salvage*, 55 F.3d at 989. In short, Plaintiff cannot invoke the jurisdiction of this Court by framing a claim as other than contractual, when, in fact, "the genesis of any wrongdoing by the United States was breach of contract." *Coffey*, 626 F. Supp. at 1248; *see also Wood*, 961 F.2d at 198 (holding that jurisdiction lies in Claims Court where cause of action arises primarily from contractual undertaking).

However, Plaintiff argues that the United States' failure to return the computer equipment is not a breach of contract because no contract existed between the parties requiring the United States to return the equipment. Plaintiff argues that its claim against the United States is not grounded in contract because there was no contractual privity between Plaintiff and the United States. Plaintiff's role in the hierarchy of contracts with the EMC, EDS, and the Navy is that of a subcontractor, or at least of a subcontractor's assignee. (Pl. Opp'n at 9 n.32.) As such, Plaintiff is still connected to Defendant via a government contract. *See Eastern Inc.*, 721 F. Supp. at 651-52. A similar situation was presented in *Eastern Inc. See generally id.* The plaintiff did not enter into a contract with a government agency (the United States Postal Service); the plaintiff's only connection to the government was that it contracted with a general contractor who, in turn,

contracted with the government. *See id.* at 651. However, the *Eastern Inc.* court found that the CDA's preemption of district court jurisdiction extended to actions brought by parties indirectly tied to the government through contract, such as subcontractors. *See id.* at 651-52. The court noted that Congress aims through the CDA to facilitate contract dispute resolution and the formation of government contracts in an efficient and cost effective manner. *See id.* at 651. Permitting parties indirectly connected to the government to sue the government in district court, after closing the doors of district courts to contractors, would increase the costs arising from government contracts. *See id.*

Plaintiff argues that suit is appropriate in this Court because Plaintiff has no remedy in the Court of Federal Claims. (Pl. Opp' n at 9.) Plaintiff is correct that the provisions of the CDA do not apply to subcontractors. *See* S. Rep. No. 1118, 95th Cong., 2d Sess. 16-17, cited in Eastern Inc., 721 F. Supp. at 649; *Johnson Controls*, 713 F.2d at 1550 (stating "the well-entrenched rule that a subcontractor cannot bring a direct appeal against the government). However, the CDA's bar of government contract disputes from jurisdiction in district courts does apply to subcontractors. *See Eastern Inc.*, 721 F. Supp. at 649. Congress has provided other avenues through which those who supply labor and materials in connection with the performance of government contracts can pursue their actions. *See id.* (describing the Miller Act and sponsorship rules); *Diamond v. Secretary of the Navy*, 25 F.3d 1006, 1009 (Fed. Cir. 1994) (stating that the indirect system of appealing on behalf of the subcontractor is referred to as a sponsorship appeal, and detailing that process); *see generally United States v. Turner Constr. Co.*, 827 F. 2d

1554 (Fed. Cir. 1987) (involving the certification procedure of the CDA's sponsorship rules). Sponsorship, for example, is available because if all subcontractors were permitted to sue the government directly, contracting officers might, without appropriate safeguards, be presented with numerous frivolous claims. *See Diamond*, 25 F.3d at 1009. Thus, despite the indirectness of Plaintiff's contractual tie to Defendant, the CDA prevents Plaintiff from suing Defendant in district court. For those reasons, Defendant's motion to dismiss for lack of subject matter jurisdiction is granted.

Because the Court finds that Plaintiff's claims are governed by the CDA based on the contracts between the parties, the Court does not reach the issue of whether Plaintiff satisfied the presentment requirements under the FTSA.

The Clerk is directed to forward a copy of this Order to counsel of record.

Entered this 2nd day of March, 2001.

s/ Gerald Bruce Lee
Gerald Bruce Lee
United States District Judge

Alexandria, Virginia
03/02/01

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DENYING PETITION FOR REHEARING EN BANC FILED JUNE 14, 2002

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

FILED
June 14, 2002

No. 01-1395
CA-00-1418-A

UNITED FEDERAL LEASING, INCORPORATED,

Plaintiff - Appellant

v.

UNITED STATES OF AMERICA,

Defendant - Appellee

and

EMC CORPORATION OF MASSACHUSETTS, a/k/a EMC Corporation,

Defendant.

On Petition for Rehearing En Banc

Appendix C

The appellant's petition for rehearing en banc was submitted to this Court. As no member of this Court requested a poll on the petition for rehearing en banc,

IT IS ORDERED that the petition for rehearing en banc is denied.

For the Court,

/s/ Patricia S. Connor
CLERK

APPENDIX D — COMPLAINT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION DATED AUGUST 21, 2000

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 00-1418-A

Plaintiff demands jury trial

United Federal Leasing, Inc.,

Plaintiffs,

v.

EMC Corporation of Massachusetts, a/k/a EMC Corporation and the United States of America,

Defendants.

COMPLAINT

Plaintiff, through the undersigned counsel, for its complaint herein, alleges as follows:

1. Plaintiff United Federal Leasing, Inc. is a Virginia corporation with its principal place of business in Virginia and was, until September 10, 1997, when it changed its corporate name, known as MLC Federal, Inc. Hereafter, this plaintiff will be referred to as "MLC Federal," as that name is reflected in the documentation underlying this action.

2. Citizens Leasing Corporation (hereafter "Citizens") is a Rhode Island corporation with its principal place of business in Rhode Island. Certain of the rights which plaintiff is pursuing in this action were originally owned by Citizens, which has assigned them to MLC Federal for the purpose of collection.

3. Electronic Data Systems Corporation ("EDS") is a Texas corporation which had a contract to lease computer equipment to the United States Navy.

4. Defendant EMC Corporation of Massachusetts, a/k/a EMC Corporation (hereafter, "EMC") is, upon information and belief, a Delaware corporation with its principal place of business in Massachusetts and which does business in Virginia.

5. The United States of America is a defendant to this action, which involves claims resulting from a lease of equipment to the Department of the Navy and its failure to return the equipment upon demand, and hereafter, the various government entities involved will be referred to as "the Government."

6. This Court has jurisdiction of this action under 28 U.S.C. § 1332 in that it is between citizens of different states and the amount in controversy exceeds $75,000, exclusive of interest and costs. The Court has jurisdiction over the government under 28 U.S.C. § 1346, and this Court has *in personam* jurisdiction over EMC because the claims in suit arise from a transaction of business in Virginia within the meaning of Code of Virginia (1950) § 8.-1-328.1.1 and EMC

does business in Virginia and is qualified to do so. Venue is proper in this district and division in accordance with 28 U.S.C. § 1391 in that a substantial part of the events and omissions underlying the claims in suit took place in this district and division.

7. MLC Federal; *inter alia*, is in the business of financing and arranging for the financing of lease contracts involving the federal government.

8. Citizens is affiliated with a bank and is in the business of providing funds to finance lease contracts.

9. EMC is a manufacturer and vendor of computer equipment.

10. EDS and the Government entered into a contract bearing Navy Contract Number N 66032-87-D-0009 and known as the Navy SPAR contract which, *inter alia*, provided the terms and conditions for EDS to lease computer equipment to the government. Hereafter, this will be referred to as "the EDS-Government contract."

11. Unlike private sector contracts, government contracts, consistent with the requirement of government contract law, typically provide numerous ways for the government to get out of a multi-year contract. These include termination for convenience, a historic doctrine now incorporated in the Federal Acquisition Regulations ("FARs") at 48 C.F.R. 52.249-02, which allows the government to terminate a contract early during a fiscal year but obliges it to pay the contractor's unreimbursed costs; on-appropriation, i.e., the right not to renew for subsequent fiscal years if Congress

fails to provide funds for those years; non-renewal, i.e., the right not to exercise fiscal year renewal options; termination without cause, i.e., the right sometimes retained by contract language to terminate under certain noted circumstances; and termination or discontinuance, i.e., the right provided under certain contracts for the government to end the contract early on notice. In this instance, the EDS-Government contract, which involved a lease of computer equipment over several fiscal years, contained all of the above-mentioned ways for the government to get out early.

12. Under the terms of the EDS-Government contract, the Government, on or about March 29, 1996 issued a contract delivery order called Amendment/Modification P00214 (hereafter "Mod. P00214"), which provided for EDS to lease to the Government certain EMC-manufactured equipment over a 36 month period. Mod. P00214 contained a special clause titled "Lease Termination" which provided:

> Leases can be terminated at the end of each government fiscal year by notifying EDS 30 days prior to the end of the government fiscal year and by not issuing a follow-on delivery order for the equipment. Leases terminated during a government fiscal year shall be in accordance with the Termination for Convenience clause of the contract. Termination costs shall equal the remainder of the lease costs for the remainder of the government fiscal year.

13. In order to obtain the EMC equipment to lease to the Government under the Government contract and Mod. P00214, EDS entered into a contract with EMC which was

titled "Assignment Agreement" entered into as of May 16, 1996 ("the EDS-EMC subcontract") which provided for EMC to provide the equipment and for EMC to receive the lease payments derived from the payments made by the Government. On the subject of getting out of the contract early, the EDS-EMC subcontract had a "flow down" clause allowing EDS to avoid payment for the full period if the Government either terminated the lease for convenience or non-renewed it.

14. Subsequent to entering into the EDS-EMC subcontract, EMC arranged for MLC Federal to finance EMC's performance of the EDS-EMC subcontract (hereafter, "the EMC-MLC Federal contract"). The EMC-MLC Federal contract consisted of an Assignment and Security Agreement between EMC and MLC Federal's affiliate, MLC Group, Inc., the terms and conditions of which were incorporated by reference, and an Agreement between EMC and MLC Federal which contained the basic terms. THE EMC-MLC Federal contract provided for MLC Federal to pay EMC $1,969,125.42 in return for which EMC assigned to MLC Federal the right to receive all but the first two of the lease payments from EDS (a remaining total of 34), and EMC also sold and assigned to MLC Federal all of EMC's "right and interest in the equipment" leased to the Government and also granted MLC Federal a security interest in the equipment. It provided for late fees of 1½% per month on any late payments.

15. On the subject of allocating between EMC and MLC Federal the risk of loss occasioned by the Government's myriad ways to get out of the contract early, the EMC-MLC Federal contract provided:

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> In conjunction with this assignment, Buyer is assuming the risks of User's non-appropriation, non-renewal and termination for convenience only. All other risks, including without limitation the termination event set forth in Section H.4.1. of the Prime Contract, are retained by Seller and shall be resolved in the manner set forth in Section 7.3.

Section 7.3 of the EMC-MLC Federal Contract provided that, in the event of a termination, EMC would pay MLC Federal the discounted net present value of the unpaid lease payments.

The EMC-MLC Federal contract also contained the following clauses governing replacement of the equipment:

> Section 7.4 Displacement: In the event that a User exercises any of its rights of non-appropriation, non-renewal or termination for convenience and within one year of such event Seller provides User with replacement Equipment, then Seller shall pay buyer the net present value of the unpaid balance of the Prime Contract Payments (calculated at the Discount Factor set forth in the schedule) within ten (10) days of written demand by Buyer. Seller shall immediately notify Buyer in the event it provides User with such replacement equipment.
>
> Section 9.6 Technology Substitutions: Upgrades, Add Ons, and Replacement Equipment: Buyer or its assigns shall have the right of first refusal to purchase all technology substitutions,

Appendix D

i.e., upgrades, add ons or replacement equipment leased to the User by Seller under each Prime Contract. Lease terms shall be coterminous with the original lease term and lease rates charged shall be determined by the Seller as negotiated with the User and with the prior approval of the Buyer. The price for such a technology substitution to be paid by Buyer would be the purchase price that the User would have paid had the transaction been an outright sale less the buyout amount of the displaced equipment on the agreed upon payment schedule. Seller will protect Buyer from any loss or reduction of the original Prime Contract Payments due to Buyer from User that may be incurred in the event of a technological substitution.

16. Based on the parties entering into the foregoing agreements, the equipment was delivered to the Government, which began using it.

17. At the end of fiscal year 1996, the Government issued a renewal, and the lease continued in force in fiscal 1997.

18. During fiscal year 1997, the Government wanted to add two groups of EMC equipment, and also wanted to extend the term of the original equipment to 42 months so it would end at the end of fiscal year 1999, making the lease period for all of the equipment coterminous.

19. MLC Federal was concerned about extending the original lease term to 42 months, because it extended the

period of its risk of a Government termination for convenience, non-renewal or non-appropriation.

20. The Government provided EDS with a letter indicating its intent to complete the full lease term.

21. As a result of receiving the letter, MLC Federal agreed to finance the new equipment and extend the lease term for the original equipment to the end of fiscal year 1999.

22. To obtain the additional equipment, the Government issued delivery orders to EDS in the form of contract modifications titled Mods. P00229 and P00230:

23. The additional equipment and lease payments for it was then added to the EDS-EMC subcontract.

24. Thereafter, EMC and MLC Federal entered into additional agreements with the same terms and conditions as the EMC-MLC Federal contract under which, in return for payment of a principal sum, EMC assigned to MLC Federal the right to receive the lease payments and sold MLC Federal all of its right and interest in the equipment and also granted MLC Federal a security interest in the equipment. Hereafter, references to the EMC-MLC Federal contract will refer to these additional agreements, as well as the original EMC-MLC Federal contract.

25. The new equipment was installed at the premises of the Government user, and, hereafter, the term, "the equipment," will refer to all of the equipment.

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26. At the end of fiscal year 1997, the Government renewed the lease for all of the equipment for fiscal year 1998.

27. Toward the end of fiscal year 1998, EMC began engaging in a series of discussions with the Navy aimed at inducing the Navy to cancel the lease of the Equipment and replace it with other, new EMC equipment, which would result in EMC making a profit on the sale or lease of this new equipment. As part of its plan to sell or lease replacement equipment, EMC introduced a new leasing company, LA Systems, to the Navy, and got LA Systems to offer to lease the Navy new replacement EMC-manufactured equipment at lower lease rates, an offer which the Navy accepted.

28. Despite repeated inquiries from MLC Federal, EMC refused to tell MLC Federal that it was engaged in discussions with the Navy to induce a replacement of the Equipment and, instead, told NEC Federal that it knew nothing about the situation or the Navy's plans.

29. As a result of EMC's activities, the Navy decided to discontinue MLC Federal's lease of the Equipment and replace it with new EMC-manufactured equipment which EMC provided to it through LA Systems functioning as an intermediary.

30. On or about August 31, 1998, the Government notified EDS by two e-mails and a telephone conversation that it was terminating the lease effective 30 days later. The first e-mail was from DITCO (a Government contracting unit) to the Government user (a defense facility at Mechanicsburg, PA.) notifying the equipment user that

DITCO has declined to give the FY 98 right of first refusal to use the SPAR contract, and the other was from the Government user's contracting officer to EDS which served as "the official 30 day notification" that the leases "shall be terminated, effective end of FY 98. Terms and conditions of P00214, 'Lease Termination' apply."

31. Upon receiving the Government's e-mails, EDS notified EMC to "[p]lease discontinue hardware leases for the equipment at the DMC-Mechanicsburg. . . ." It also stated a "confirming discontinuance purchase order(s) will be sent. . . ."

32. EDS' discontinuance notice was forwarded to MLC Federal.

33. After receiving EDS' discontinuance notice, MLC Federal wrote EMC demanding payment of the net present value of the lease payments under the EMC-MLC Federal contract, because the Government's action was one of the risks EMC had retained. MLC Federal also demanded that, upon the Government's release of the equipment on September 30, 1998, EMC make it available to MLC Federal for removal and sale.

34. EMC has refused and failed to make payment and has not provided the equipment to MLC Federal, despite demand.

35. MLC Federal made demand on the Government for return of the equipment, but the Government has refused to provide it.

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36. EMC has not paid MLC Federal, and the Government did not issue a renewal for the Equipment and kept and continued using it beyond the effective date of its discontinuance without paying MLC Federal for it.

37. MLC Federal has made demand for the equipment on EMC and the Government, and all have failed and refused to provide it despite the fact that none of those parties has a right to retain possession or custody of the equipment as against MLC Federal.

38. Upon information and belief, the Government kept and used the Equipment until the middle of November, 1998, when the Equipment was replaced by the new EMC equipment which EMC provided to the government through LA Systems.

39. Thereafter, EMC took the Equipment and did not provide it to MLC Federal.

40. On or about October 12, 1998, MLC Federal made claim on the government in accordance with the Federal Tort Claims Act seeking damages for conversion. The Government denied MLC Federal's claim on February 24, 2000.

First Claim — Conversion against EMC and the Government

4. MLC Federal has a property right and interest in the Equipment — which is identified by the attachments to P00214, P00229, P00230, the EDS-EMC Subcontract and the EMC-MLC Federal contract — and, since the Government, after September 30, 1998, was not holding the

equipment under any contract right, MLC Federal had the right to immediate possession of the equipment as against EMC and the Government. MLC Federal also had a right to possession of the equipment, because it was held under a bailment, and the Government bailee has refused to return the equipment after demand and has violated the bailment by an act of conversion. EMC and the Government also had possession of the equipment — actual or constructive — prior to the institution of this action.

4. MLC Federal is and has been entitled to possession of the equipment.

43. EMC and the Government have exercised dominion and control over the equipment and have failed and refused to return it to MLC Federal despite due demand:

44. Despite MLC Federal's interest in and entitlement to immediate possession of the equipment, EMC and the government have continued to deprive MLC Federal of the equipment and have caused MLC Federal damages as a result equal to the loss of the value of the Equipment, estimated at $560,000, and, as to the Government, the fair market rental value of the Equipment, estimated at $560,000.

Second Claim — Breach of Contract against EMC

45. Under the EMC-MLC Federal contract, EMC bore the risk of all Government terminations other than termination for convenience, non-appropriation and non-renewal.

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46. The Government's termination was neither a termination for convenience, non-appropriation nor non-renewal, because, in notifying EDS of termination, the Government based its actions on the "Lease Termination" clause of P00214 which, as EDS showed in its notice, was a discontinuance. That clause allows for termination for convenience during a fiscal year and termination at the end of a fiscal year by 30 day notice, which the Government gave to EDS. In termination for convenience, the contractor is entitled to a settlement covering all of its unrecovered costs under 48 U.S. C. § 52.249-2, and the Government's notice did not trigger that process. Accordingly, the Government's action was an end of the fiscal year termination under P00214 or discontinuance. This was not one of the risks assumed by MLC Federal, and it is therefore EMC's risk.

47. MLC Federal has made demand on EMC to pay the net present value of the lease to MLC Federal which EMC is required to pay under § 7.3 of the EMC-IVrC Federal contract in the amount of $858,307.83.

48. EMC is also required under the EMC-MLC Federal contract to pay late charges of 18% per year and all of MLC Federal's attorneys' fees of this action.

49. As a result of the foregoing, EMC is in breach of contract and liable to MLC Federal for $858,307.83 plus late charges.

Third Claim - Breach of Contract against EMC

50. In the alternative, EMC is in violation of § 7.4 of the EMC-MLC Federal contract in that, if the government

cancellation was a risk assumed by MLC Federal, EMC was obliged to pay MLC Federal the net present value of the Lease in the event it provided the government with replacement equipment within one year. EMC was also obliged to notify MLC Federal.

51. EMC has in fact provided the government with replacement equipment for the equipment and has not notified MLC Federal, and, after it discovered the facts, MLC Federal made demand on EMC to make payment under § 7.4, but EMC has not done so. As a result, EMC is in default under § 6.1 of the EMC-MLC Federal contract.

52. Due to this breach of contract, EMC is obliged to pay MLC Federal $858,307.83, the net present value of the lease, as well as late damages at 18%/year under the terms of the EMC-MLC Federal contract.

Fourth Claim — Breach of Contract against EMC

53. EMC provided the government with a technology substitution, i.e., replacement equipment by lease, and, accordingly, was obliged under § 9.6 of the EMC-MLC Federal contract to offer MLC Federal a right of first refusal to purchase the replacement equipment and lease the replacement equipment to the government.

54. EMC failed to offer MLC Federal a right of first refusal and is, as a result, in breach of contract.

55. As a result of EMC's breach of contract, MLC Federal and Citizens have suffered an injury in that they have lost

the profits they would have made had EMC offered a right of first refusal to MLC Federal.

Fifth Claim — Breach of Covenant of Good Faith and Fair Dealing against EMC

56. The EMC-MLC Federal contract had an implied covenant of good faith and fair dealing ("the covenant").

57. By inducing the Government to discontinue the Lease and use a straw man to avoid liability and by failing and refusing to inform MLC Federal of the true facts when it was under a duty to do so, EMC has breached the covenant.

58. As a result, EMC is liable to MLC Federal for its and Citizens' losses, including the net present value of the lease, and NTLC Federal's and Citizens' lost profits.

Sixth Claim — Tortious Interference with Contractual Expectations Against EMC

59. MLC Federal had a legitimate expectation that the government would renew the lease and complete it to term.

60. EMC interfered with MLC Federal's expectation by intentionally inducing the Government to discontinue the Lease and did so without justification or right and did so intentionally, willfully and wantonly, with callous disregard for MLC Federal's rights and for its own benefit and as part of a plan and pattern to do so.

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61. As a result of EMC's actions, the Government discontinued the Lease, thereby causing MLC Federal and Citizens injury.

62. As a result, EMC is liable to MLC for actual and punitive damages.

Seventh Claim — Against EMC for Violation of Ch. 93A, § 11, Mass. Gen. Laws

63. EMC and MLC Federal are both persons who engage in the conduct of any trade or commerce within the meaning of Chapter 93A, § 11 of Mass. Gen. Laws ("the Statute").

6. MLC Federal has suffered a loss of money as a result of the use by EMC of unfair methods of competition and unfair and deceptive acts and practices which are unlawful.

65. EMC's deception occurred primarily and substantially in Massachusetts as required and defined by the Statute.

66. As a result, EMC is liable under the Statute for all of its damages, and the court is requested to double or treble the damages, in the exercise of its discretion.

Wherefore, MLC Federal requests the court to grant the following relief:

A. Against the Government, damages for conversion in the amount of $560,000.

B. Against EMC, damages to consist of:

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1. $858,307.83 representing the net present value of the lease.

2. Interest on the foregoing at 18% per year.

3. An amount to compensate for lost profits.

4. An amount to compensate for conversion of the equipment equal to $560,000 (if not paid by the Government) to cover the period of the Government holding the equipment after September 30, 1998 and an additional amount reflecting the value of the Equipment at the date the Government was longer in possession.

5. A doubling or trebling of the damages in the court's discretion.

6. Punitive damages in an amount the court finds proper.

7. Interest and attorney's fees and such other relief as the court finds proper.

Respectfully submitted,

Michael E. Geltner, Esq.
Geltner & Associates, P.C.
10 E Street, S.E.
Washington, DC 20003
(202) 547-1136
Virginia Bar No. 020485
Attorney for Plaintiff
United Federal Leasing, Inc.

APPENDIX E — LETTER REGARDING NAVY CONTRACT DATED OCTOBER 19, 1998

DEPARTMENT OF THE NAVY
NAVAL INVENTORY CONTROL POINT

700 ROBBINS AVENUE
PHILADELPHIA, PA 19111-5098

5450 CARLISLE PIKE — PO BOX 2020
MECHANICSBURG, PA 17055-0788

COM & FTS (717) 790-2639
DSN & EXT 430 & EXT 2639
FAX # (717) 790-4600
IN REPLY REFER TO:

4200
SER 0272.7/001
19 October 1998

Ms. Donna O'Hear
United Federal Leasing, Inc.
11150 Sunset Hills Road, Suite 110
Reston, VA 20190

Dear Ms. O'Hear:

This letter is in response to your Fax of October 16, 1998 regarding Navy Contract N66032-D-0009.

The Government has terminated the lease under the lease termination provisions of the contract. As the referenced contract is with Electronic Data Systems (EDS) and the Navy

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has no contractual arrangement with your company, you will need to pursue your interests with whomever you have contracted with for this equipment.

For your information, it is our belief that the equipment in question is currently under contract through the Defense Information Technology Contracting Office.

Sincerely,

s/ W. P. Gleixner
W. P. Gleixner
Contracting Officer